

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. S-2607

PETITION OF JOHN YE

OPINION OF THE BOARD

(Public Hearing Date: July 9, 2004)

(Effective Date of Opinion: September 10, 2004)

Case No. S-2607 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment. The Hearing Examiner for Montgomery County convened a public hearing on the case on July 9, 2004, and on August 9, 2004, issued a report and recommendation for approval of the special exception.

Decision of the Board: Special Exception **granted** subject
to conditions enumerated below.

The subject property is Lot 5, Block 5, Foxhall Subdivision, located at 2608 Woodedge Road, Silver Spring, Maryland, 20906, in the R-90 Zone.

The Board of Appeals considered the report and recommendation at its Worksession on September 1, 2004. After careful consideration and review of the record in the case, the Board adopts the report and recommendation and grants the special exception subject to the following conditions:

1. The Petitioner is bound by Petitioner's testimony, representations and exhibits of record;

2. The Petitioner will take the following steps to rectify issues set forth in the Memorandum of Cynthia Lundy, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 13):

a. An electrical work permit must be obtained and finalized for the kitchen stove in the accessory apartment.

- b. Based on the square footage, no more than two unrelated persons, or a family of four may reside in the unit.
- c. A window that meets housing code standards for emergency egress must be installed in the bedroom located on the right side of unit. (The window shall be at least five (5) square ft. in net clear opening with a minimum net clear height of 22 in. and a net clear opening width of 20 in. with the bottom of the opening not more than 44 in. above the floor).
- d. A vent or grill must be installed in the furnace/laundry room door to ensure sufficient make-up air for proper combustion.
- e. The dryer must vent to the outside.
- f. The entrance door must have a single-cylinder dead-bolt lock installed. The lock must be key operated from the outside; thumb-turn from the inside.

3. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located; and

4. Petitioner must not receive compensation for the occupancy of more than one dwelling unit.

5. Petitioner must dedicate one of the parking spaces on his driveway to the accessory apartment tenant.

On a motion by Allison Ishihara Fultz, seconded by Angelo M. Caputo, with Louise L. Mayer, and Donald H. Spence, Jr., Chairman in agreement and Donna L. Barron necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 10th day of September, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:

JOHN YE,

Petitioner

John Ye

For the Petition

2607

Barbara Foresti

Rob Dejter

Cynthia Lundy

Department of Housing and

Community Affairs

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Board of Appeals Case No. S-

(OZAH Referral No. 04-38)

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Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2607, filed on February 20, 2004, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 2608 Woodedge Road, Silver Spring, Maryland. The subject property is designated Lot 5, Block 7, in the Foxhall Subdivision of Silver Spring. It is zoned R-90, and the Tax Account Number is 01392793.

On March 9, 2004, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on July 9, 2004, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 10).¹

On March 8, 2004, Dr. and Mrs. Francis Schuler, confronting neighbors of Petitioner, wrote with objections to the proposed accessory apartment (Exhibit 11).

The Department of Housing and Community Affairs inspected the property on July 1, 2004, and reported the following issues in a memorandum dated July 2, 2004 (Exhibit 13):

1. The kitchen stove was installed without applying for a County electrical permit. An electrical work permit must be obtained and finalized.
2. The total habitable floor area measures approximately 459 [sq.] ft. Based on the square footage either two unrelated persons, or a family of four may reside in the unit.
3. A window that meets housing code standards for emergency egress must be installed in the bedroom located on the right side of unit. (The window shall be at least five (5) square ft. in net clear opening with a minimum net clear height of 22 in. and a net clear opening width of 20 in. with the bottom of the opening not more than 44 in. above the floor).
4. A vent or grill must be installed in the furnace/laundry room door to ensure sufficient make-up air for proper combustion.
5. The dryer must vent to the outside.
6. The entrance door must have a single-cylinder dead-bolt lock installed. The lock must be key operated from the outside; thumb-turn from the inside.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued July 7, 2004, recommended approval of the special exception, with conditions. (Exhibit 14).²

A public hearing was convened as scheduled on July 9, 2004, and Petitioner John Ye appeared *pro se*. Also attending were Barbara Foresti, Robert Dejter and Cynthia Lundy, employees of the Department of Housing and Community Affairs.

¹ A corrected notice was issued on June 22, 2004, but the date and place was unchanged (Exhibit 12).

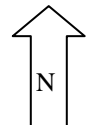
² The Technical Staff report is frequently quoted and paraphrased herein.

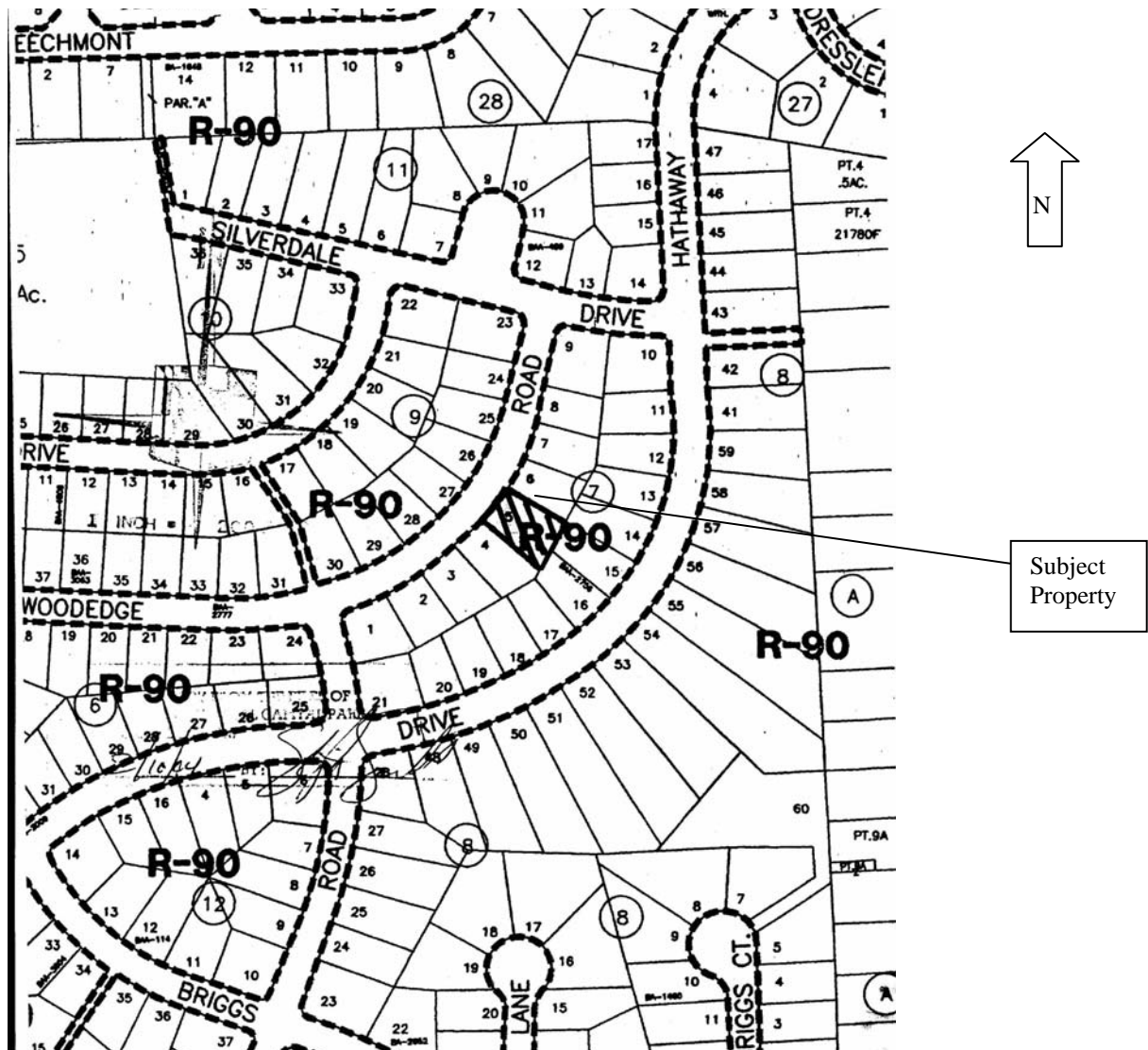
Testimony was received from Petitioner and the Housing and Community Affairs employees. No opposition appeared. Petitioner executed an affidavit of posting (Exhibit 15), and introduced a revised Landscape and Lighting Plan (Exhibit 16), as had been recommended by Technical Staff. Petitioner also agreed to meet all the conditions set forth in the Technical Staff Report (Exhibits 14) and in the Housing Code Inspector's Report (Exhibit 13). The record was held open till July 19, 2004, so that Petitioner could submit a copy of his deed to the subject property. He did so (Exhibit 19), and the record closed on July 19, 2004.

II. FACTUAL BACKGROUND

A. The Subject Property

As noted above, the address of the subject property is 2608 Woodedge Road, Silver Spring, Maryland. The subject property has an 11,330 square foot lot, which is designated Lot 5, Block 7, in the Foxhall Subdivision of Silver Spring. It is zoned R-90 (Residential, one-family, detached). The residence in question is located on the east side of Woodedge Road, approximately 300 feet from its intersection with Silverdale Drive, as shown in the following excerpt from the zoning map attached to the Technical Staff report and introduced as Exhibit 8.





The lot has a street frontage along Woodedge Road of approximately 70 feet, according to the Technical Staff report. The two-story brick and vinyl dwelling was constructed in 1964 and contains nearly 2,000 square feet of living area. Technical Staff also reports that a building permit (#296097) was issued to the Petitioner on January 15, 2003 to convert the right side porch into a garage and to construct a sunroom to the rear of the garage. The permit also provided the Petitioner permission to finish the existing basement, which he has done. The property is shown in the following recent photo (Exhibit 17).



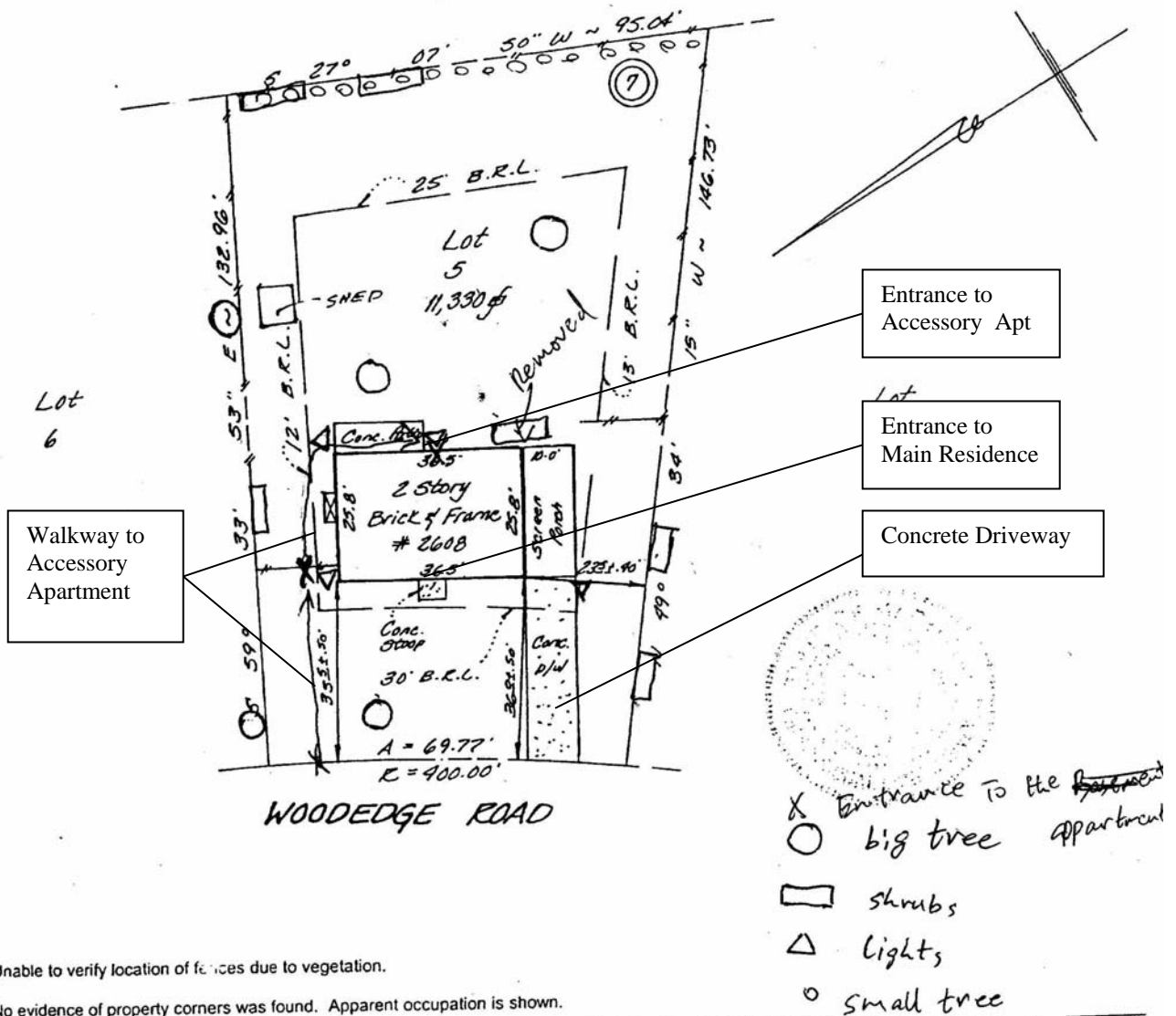
Thursday, July 01, 2004
2608 Woodedge Road

Technical Staff describes the property as follows (Exhibit 14):

The subject property is an interior lot and is mostly flat. The rear yard slopes gently downward towards the rear lot line. The dwelling is setback approximately 36 feet from Woodedge Road. The dwelling has a right side yard of 13.5 feet, a left side yard of 16 feet and a rear yard of approximately 60 feet. A driveway that measures 20 feet in width and 36 feet in depth extends from Woodedge Road to the one-car garage. There is a patio located to the right side of the garage. The property is well landscaped with a wide array of mature trees in addition to various shrubs and flowers. The rear yard and both side yards are enclosed with a six-foot tall wooden fence. A row of evergreen trees, approximately 5 feet, in height are planted along the rear fence line. A storage shed is located in the northeast corner of the property.

The general layout of the subject property can be seen on the following copy of the Revised Landscape and Illumination Plan (Exhibit 16).

Revised Landscape and Elimination Plan



Unable to verify location of fences due to vegetation.

No evidence of property corners was found. Apparent occupation is shown.

Date: 12-18-02 Scale: 1" = 30' ADrn: 170
 Plat Book: 67
 Plat No.: 6224 NO TITLE REPORT FURNISHED
 Work Order: 02-5866
 Address: 2608 WOODEDGE ROAD
 District: 13
 Jurisdiction: MONTGOMERY COUNTY, MD

LOCATION DRAWING
 LOT 5
 BLOCK 7
 PLAT 4
 FOXHALL

Surveyor's Certification
 I hereby certify that the survey shown hereon is correct to the best of my knowledge and that, unless noted otherwise, it has been prepared with the best description of record. This survey is not a boundary survey and the local existence of property corners is neither guaranteed nor implied. Fence lines, if shown, are approximate in location. This property does not lie within a year flood plain according to FEMA insurance maps as interpreted by the originator unless otherwise shown hereon. Building restriction lines show as per available information and are subject to the interpretation of the originator.

[Signature]

NOTE: This plat is of benefit to a consumer only insofar as it is required by a

EVU010720

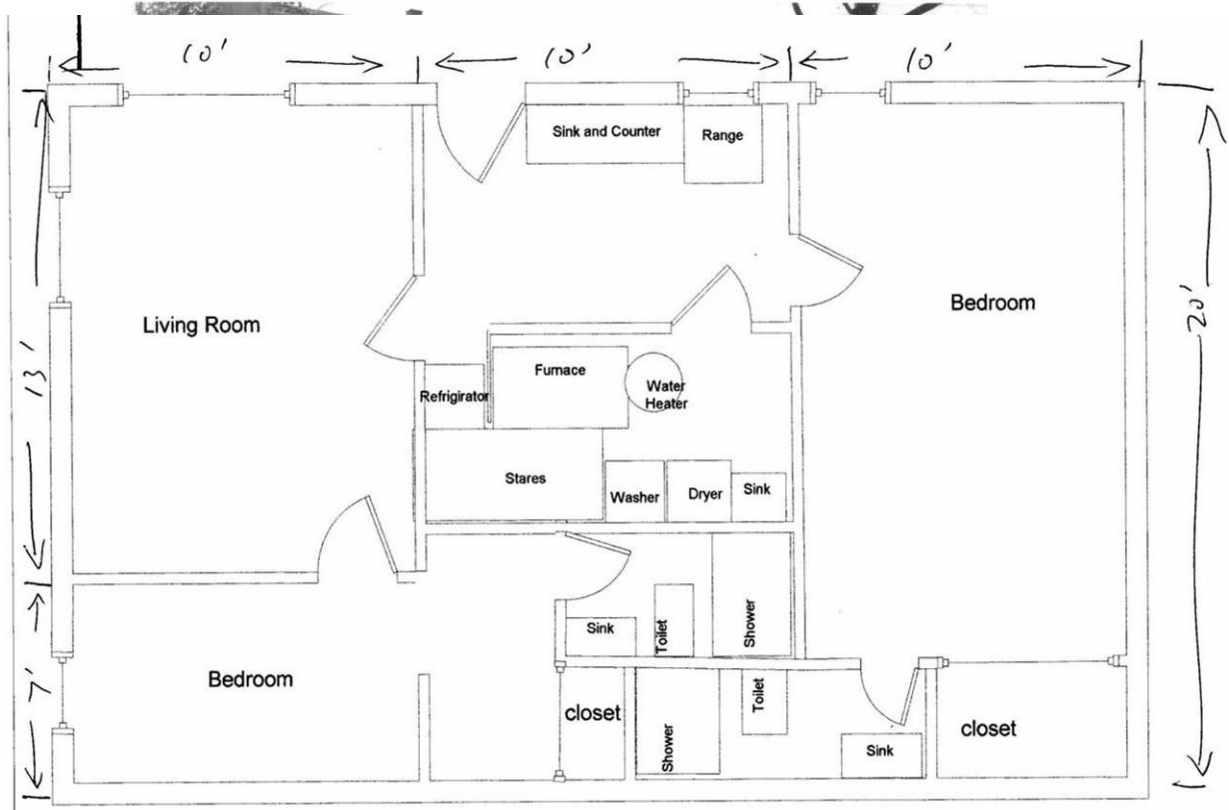
16

Meridian Surveys, Inc.

B. The Proposed Use

The proposed accessory apartment is located in the basement of the house and has a separate entrance on the rear of the home. It is approached by a concrete walkway which begins at the street and continues on the side of the house, then down some steps and around to the back of the house, as can be seen on the landscape plan shown above. A portion of the walkway to the accessory apartment is depicted below in the bottom photo from Exhibit 9(b), followed by a photo of the accessory apartment entrance, from Exhibit 9(a).

According to the Petitioner, the accessory apartment measures approximately 600 square feet, although the Housing Code Inspector calculated the habitable space as 459 square feet (Exhibit 13). It includes two bedrooms, a living room, two bathrooms and a kitchen area. The floor plan for the basement, including the accessory apartment, is shown below (Exhibit 5).



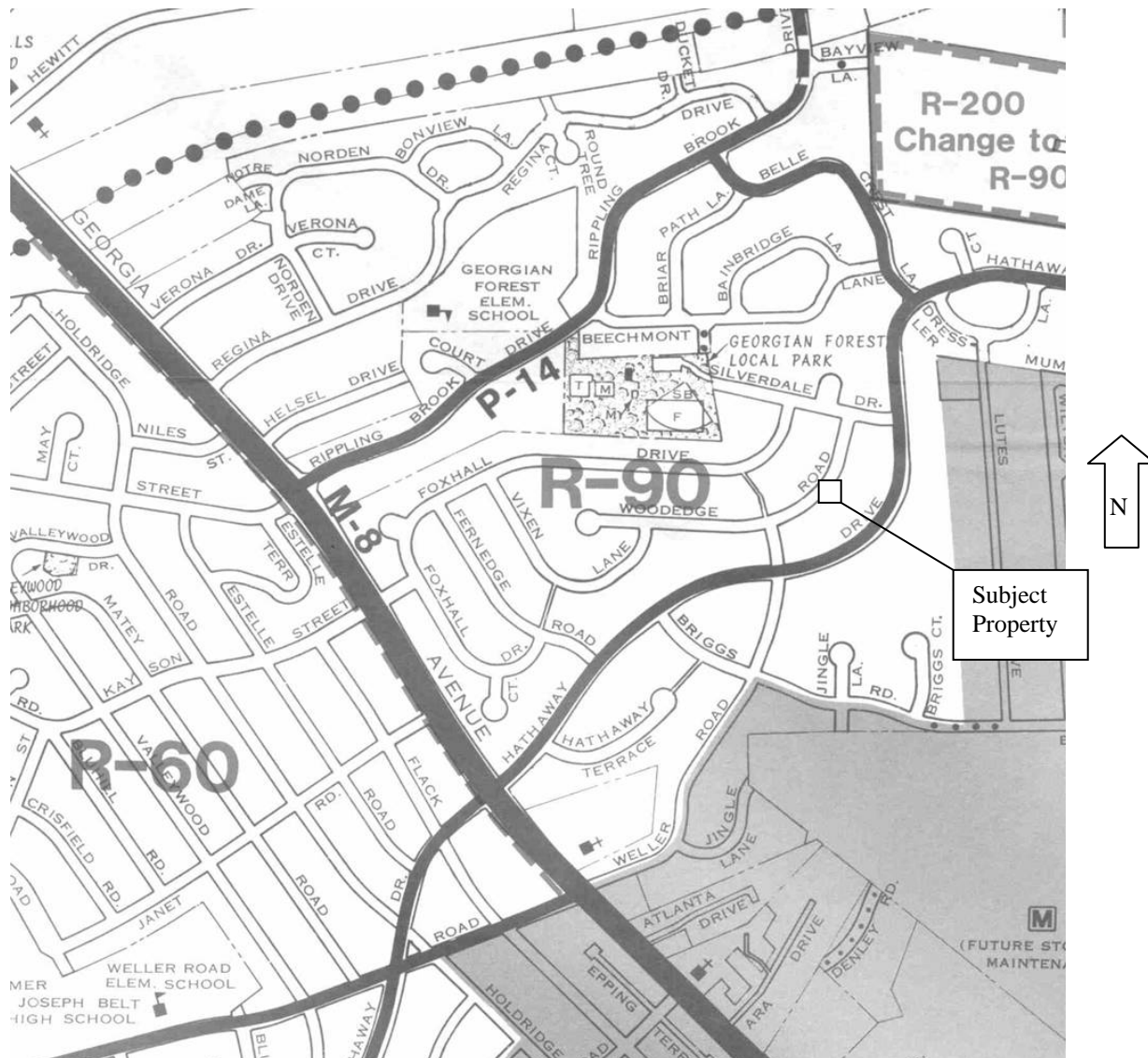
The Housing Code Inspector's Report indicates that the accessory apartment may be occupied by no more than two individuals or a family of four, and raised the issues set forth on page 2 of this Report. Petitioner has agreed to correct all the deficiencies noted by the Housing Code Inspector.

According to Petitioner, his garage will hold one car, and his driveway has room for four cars. Tr. 23-24. Technical Staff estimates that the driveway could actually accommodate six cars, and on-street parking is also available. In any event, only two on-site spaces are required, and Petitioner clearly meets that standard. The Hearing Examiner will recommend a condition that one of the spaces be dedicated to the accessory apartment tenant, and Petitioner has agreed to that condition.

C. The Neighborhood and its Character

The Foxhall neighborhood surrounding the subject site is bordered by Foxhall Drive and Silverdale Drive to the north, Georgia Avenue to the west, and Hathaway Drive to the east and south. The Hearing Examiner accepts that definition, and the neighborhood is depicted below on a portion of the Kensington-Wheaton Master Plan map filed as Exhibit 6.

The neighborhood land is zoned R-90 for single-family dwellings, and is fully developed with detached single-family residences. Single-family detached homes extend to the west and east on Woodedge Road on both sides of the street. According



to Technical Staff, the majority of the residences have driveways and attached garages/carports, and there are no accessory apartments in the general neighborhood, nor other special exceptions in the immediate area.

D. Neighborhood Opposition

The only opposition to the instant petition from the neighborhood is contained in the letter from Dr. and Mrs. Schuler, who live across the street from the subject property, at 2607 Woodedge Road. They complain that Petitioner allegedly built the accessory apartment without prior permission from the county; that bright lights turn on each time someone goes back to or comes out from the basement apartment; that there are often up to five cars parked in the street and driveway; that the Petitioner cannot meet the standard for “a variance;” that the special exception permit sign has not been properly displayed; and that granting the special exception will make the house permanently marketable as a home with an apartment, changing the character of the neighborhood. Exhibit 11.

Answering the Schulers’ concerns, point by point:

1. Allegedly unapproved construction of the accessory apartment. Technical Staff reports that Petitioner had a permit to finish his basement, which is where the accessory apartment is located. Whether the apartment was occupied prior to receiving a special exception is not an issue before the Hearing Examiner at this juncture. We are tasked with determining whether Petitioner qualifies for the special exception he seeks under the zoning laws, and he does.
2. Bright lights. Technical Staff found (Exhibit 14, p. 4) that the “major doorways and pathways to the subject site are well lighted, but not to an obtrusive degree,” and the Housing Code Inspector, Ms. Lundy, testified that she “would be hard-pressed . . . to think that the lighting, especially if he is stating that it’s directed downward, would affect them.” Tr. 29. Unfortunately, the Schulers did not attend the hearing so there is no evidence to clarify their concerns about the lighting. The Hearing Examiner did ask Petitioner to swivel the lights away from the Schulers’ residence, if possible, and he agreed to do so. Tr. 29.
3. Cars parked in the driveway. Although Petitioner is permitted to park cars in his driveway, the Hearing Examiner will recommend a condition requiring Petitioner to allocate at least one of those driveway spaces to the accessory apartment tenant. Technical Staff concluded, as noted above, that there was ample parking, both on and off site. Petitioner more than meets the statutory criterion of two off-street spaces.
4. Requirements for a variance. Petitioner is not applying for a variance. He need only meet the requirements for a special exception, as detailed in Part IV of this Report, below.
5. Display of the Notice Sign. Petitioner testified that, at first, the post he used for the sign was too flimsy, but after being alerted by a call from the Board of Appeals about two weeks after he filed the application, he tied the sign post to a tree and the sign has remained firmly posted since then. Tr. 8-11. In the absence of any contrary testimony, the Hearing Examiner accepts Petitioner’s sworn testimony and affidavit of posting (Exhibit 15), as representing the preponderance of the evidence.
6. The effect on the character of neighborhood. The Hearing Examiner has no basis for concluding that granting a special exception in this case will change the character of neighborhood. As noted by Technical Staff, the accessory apartment will be located in

the basement of the existing dwelling and will not require any exterior construction; there is more than sufficient parking; traffic conditions will not be affected adversely; there is not an excess of similar uses in the defined neighborhood, and special exceptions for accessory apartments are expressly permitted by the Zoning Code for the R-90 Zone. Therefore, Technical Staff opined that “there are no non-inherent adverse effects arising from the accessory apartment” and “the use will be in harmony with the general character of the surrounding residential neighborhood.” The Hearing Examiner has no evidentiary basis to find to the contrary. Under Maryland law, probative evidence, such as that provided by Technical Staff in their report, cannot be outweighed by contentions that amount to little more than generalized concerns and unsupported allegations. See *Rockville Fuel & Feed Co. v. Board of Appeals*, 257 Md. 183, 192-93, 262 A.2d 499, 504-505 (1970); *Moseman v. County Council of Prince George’s County*, 99 Md. App. 258, 265, 636 A.2d 499 (Ct. Spec. App. 1994).

E. The Master Plan

The subject property is covered by the *1989 Kensington-Wheaton Master Plan*. The property is zoned R-90 for single-family detached housing, and Zoning Code §59-C-1.31(a) permits accessory apartments by special exception in the R-90 Zone. The Master Plan does not have any specific guidance for the property in question, but two objectives of the Plan are “[t]o protect and stabilize the extent, location, and character of exiting residential and commercial land uses [and t]o maintain the well established low-to medium-density residential character which prevails over most of the planning area.” (page 40). Because Petitioner plans no external structural modifications to the subject property, the requested special exception will maintain the residential character of the area.

Moreover, the Hearing Examiner takes official notice of a recent study by the M-NCPPC noting that:

[accessory apartments] can be an excellent solution to the shortage of affordable housing by producing extra income for homeowners, dispersing the supply of moderate-cost housing more uniformly throughout the community, contributing to the tax base, reducing sprawl by providing more concentrated urban housing opportunities, and providing a means for extended family members to live together in a single site. (Housing Montgomery: A Menu of Options for a Dramatic Increase in the Supply of Housing for our Workforce, 3/6/03, Montgomery County Planning Board Agenda Item #1)

Thus, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the goals and objectives of the *Kensington-Wheaton Master Plan*.

III. SUMMARY OF HEARING

At the July 9, 2004 hearing, testimony was heard from Petitioner and from Robert Dejter and Cynthia Lundy, employees of the Department of Housing and Community Affairs.

Petitioner executed an affidavit of posting (Exhibit 15), and introduced a revised Landscape and Illumination Plan (Exhibit 16), as had been recommended by Technical Staff. Petitioner also agreed to meet all the conditions set forth in the Technical Staff Report (Exhibits 14) and in the Housing Code Inspector's Report (Exhibit 13). Tr. 6-7.

When asked about the assertion in the Schulers' letter (Exhibit 11) that he had improperly posted the notice sign, Petitioner testified that, at first, the post he used for the sign was too flimsy, but after being alerted by a call from the Board of Appeals about two weeks after he filed the application, he tied the sign post to a tree and the sign has remained firmly posted since then. Tr. 8-11.

In further questioning by the Hearing Examiner, Petitioner testified as to his compliance with each of the general and specific standards for obtaining an accessory apartment special exception. Tr. 16- 31. Specifically, there would be only one accessory apartment; the apartment would have at least one party wall in common with the main dwelling; the house was built in 1964; there is no family of unrelated persons on the premises; there are no rental uses on the premises other than the subject accessory apartment; there is a separate entrance for the accessory apartment that preserves the appearance of a single family home; there are no modifications planned to the external part of the house; the accessory apartment would have the same street address as the main dwelling; the owner, Mr. Ye, would occupy the main dwelling; he has owned the property since December of 2002 (*i.e.*, more than a year has elapsed since the owner purchased the property);³ compensation will be received by Petitioner for only one dwelling unit; the lot is approximately .26 acres (*i.e.*, about 11,325 square feet, which exceeds the 6,000 square foot minimum lot size); he doesn't know of other special exceptions in the area; there is off-street parking in his driveway for four cars plus a one-car garage; he agreed to dedicate one of the driveway spaces to the accessory apartment tenant; the accessory apartment use is consistent with the applicable Master Plan, as far as Petitioner knows; the accessory apartment will be in harmony with the general character of neighborhood; the accessory apartment would not be detrimental to the use, peaceful enjoyment, value or development of the surrounding properties; there would be no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity; the accessory apartment would not alter the residential nature of the area, nor would it adversely affect the health, safety, security, morals or general welfare of the residents, visitors or workers in the area; it would be served by adequate public facilities; and would not reduce the safety of vehicular or pedestrian traffic.

With regard to the Schulers' complaint about bright lights, the Hearing Examiner asked Petitioner to swivel the motion sensitive lights shown in his revised landscape and illumination plan away from the Schulers' residence, if possible, and he agreed to do so. Tr. 29.

Housing Code Inspector Cynthia Lundy testified that Petitioner's accessory apartment has about 459 square feet of habitable space. Tr. 20. She further testified that there were no other accessory apartment special exceptions in the neighborhood. Tr. 23. Ms. Lundy produced photos of the driveway area, and they were introduced as Exhibits 17 and 18. Tr. 24. As to the Schulers' complaint about Petitioner's lights, Ms.

³ After the hearing, Petitioner filed a copy of his deed (Exhibit 19) showing that the property was conveyed to Petitioner on December 30, 2002.

Lundy testified that she “would be hard-pressed . . . to think that the lighting, especially if he is stating that it’s directed downward, would affect them.” Tr. 29.

Ms. Lundy further testified as to the issues raised in her inspection report (Exhibit 13). Tr. 31-38. Although Petitioner indicated he could do most of the repairs within a week, Ms. Lundy noted that obtaining the permits for the kitchen stove would likely take 30 to 45 days, but the condition is not dangerous. Tr. 34-36. The Hearing Examiner advised Petitioner to fix the window exit, furnace vent and dryer vent right away for safety reasons, and Petitioner said he would do so. Tr. 37. The only problems noted by Ms. Lundy were those raised in her report.

Housing Code Supervisor Rob Dejter testified that tax records indicate Petitioner’s lot size as being 11,300 square feet. Tr. 21. He also noted that his office tracked accessory apartments, but not other special exceptions. Tr. 23.

The record was held open for ten days after the hearing to give Petitioner an opportunity to file a copy of his deed.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if he complies with the recommended conditions (Exhibits 14).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily

associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists for following inherent characteristics of accessory apartments:

the existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; provision of sufficient parking; the existence of an additional household on the site; additional activity from that household, including potential for additional noise from that additional household.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two. That is the case here. There are no unusual characteristics of the site.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use which would require denial of the petition.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff reports, the Housing Code Inspector’s report, the exhibits in this case and the testimony of the Petitioner and the Housing Code Inspectors provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Conclusion: An accessory apartment is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does*

not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the *1989 Kensington-Wheaton Master Plan*. The property is zoned R-90 for single-family detached housing, and Zoning Code §59-C-1.31(a) permits accessory apartments by special exception in the R-90 Zone. The Master Plan does not have any specific guidance for the property in question, but two objectives of the Plan are “[t]o protect and stabilize the extent, location, and character of existing residential and commercial land uses [and t]o maintain the well established low-to medium-density residential character which prevails over most of the planning area.” (page 40). Because Petitioner plans no external structural modifications to the subject property, the requested special exception will maintain the residential character of the area. Thus, the Hearing Examiner concludes that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the goals and objectives of the *Kensington-Wheaton Master Plan*. Technical Staff reached the same conclusion.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: Technical Staff noted that “the accessory apartment will be located in the basement of the existing dwelling and will not require construction of an addition to provide additional floor space. There is more than sufficient parking: six spaces on the driveway, a garage and on-street parking in front of the house. Traffic conditions will not be affected adversely. Staff does not find an excess of similar uses in the defined neighborhood, since there are no other existing special exception uses.” Based on these facts and the other evidence of record, the

Hearing Examiner concludes that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found the accessory apartment will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood because “this single-family neighborhood can easily and harmoniously accommodate the activity associated with this special exception. Further, the long driveway, tall trees and other generous landscaping, and fencing on every side (reaching about six feet on two sides), all help to screen the activity from neighboring properties.” Petitioner also testified that the accessory apartment would not adversely affect the neighborhood. The only evidence in the record to contradict Petitioner’s testimony and the Technical Staff’s conclusion is the letter from the Schulers (Exhibit 11), which is outweighed by the testimony and the Technical Staff report in this case. Therefore, the Hearing Examiner finds that the accessory apartment will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Petitioner testified that the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. The Schulers wrote (Exhibit 11) that bright lights turn on each time someone goes back to or comes out from the basement apartment. As noted in Part II.D. of this report, Technical Staff found (Exhibit 14, p. 4) that the “major doorways and pathways to the subject site are well lighted, but not to an obtrusive degree,” and the Housing Code Inspector, Ms. Lundy, testified that she “would be hard-pressed . . . to think that the lighting, especially if he is stating that it's directed downward, would affect them.” Tr. 29. Thus, the weight of the testimony supports the conclusion that the accessory apartment will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly*

residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

- Conclusion: There are no accessory apartments in the neighborhood according to the Housing Code Inspector's testimony, and there are no special exceptions of any kind in the area, according to Technical Staff. Therefore, the Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely.
- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

- Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.
- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

- Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities.
- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

- Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of both the Local Area Transportation Review ("LATR") and the Policy Area Transportation Review ("PATR").⁴ The Technical Staff did do such a review, and concluded that the proposed

⁴ The Policy Area Transportation Review (PATR) was abolished as of July 1, 2004, pursuant to the FY 2003-5 Annual Growth Policy (AGP) – Policy Element.

accessory apartment use would add one additional trip during each of the peak hour weekday periods. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. See the July 2004 LATR Guidelines, of which the Hearing Examiner takes official notice. Therefore, the Transportation Staff concludes, as does the Hearing Examiner, that the instant petition meets the LATR.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that the proposed use will "not reduce the safety of vehicular or pedestrian traffic," the Hearing Examiner so finds.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 14), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) *Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

- (2) *The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) *The lot is 2 acres or more in size; and*
- (ii) *The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped*

relative of the owner-occupant.

Conclusion: The apartment is located in the basement of the house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

(3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.

Conclusion: No addition or extension of the main dwelling is proposed.

(4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.

Conclusion: The original house was built in 1964. It therefore meets the "5 year old" requirement.

(5) The accessory apartment must not be located on a lot:

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use does not violate any of the provisions of this subsection.

(6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

Conclusion: Access to the accessory apartment is through a back door to the basement, which is not visible from the street. There will be no change to the residential appearance of the dwelling.

(7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

Conclusion: No external modifications are proposed.

(8) The accessory apartment must have the same street address (house number) as the main dwelling.

Conclusion: The accessory apartment will have the same address as the main dwelling.

(9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.

Conclusion: The accessory apartment is clearly subordinate to the main dwelling, as it occupies approximately 600 square feet (459 of which is habitable space) in the basement of Petitioner's home, which has roughly 2,000 square feet of floor space.

59-G § 2.00(b) Ownership Requirements

- (1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioner lives in the main dwelling and plans to continue living there.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioner acquired the property in 2002 according to the deed (Exhibit 19), more than one year before the filing of the petition in 2004.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioner will receive compensation for only one dwelling unit.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioner is the owner of the property.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable

59-G § 2.00(c) Land Use Requirements

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

Conclusion: The subject lot is approximately 11,330 square feet in size. The following chart from page 5 of the Technical Staff Report (Exhibit 14) demonstrates compliance with all development standards:

<i>Development Standard</i>	<i>Required</i>	<i>Provided</i>
Minimum Lot Area (square feet)	9,000	11,330
Minimum lot width (feet) at front building line for 1-family detached dwelling	75	76
Minimum street setback (feet)	30	35
Minimum Setback from adjacent lot (feet)		
--One side	8	13.5
--Sum of both sides	25	29.5
--Rear	25	Approx. 60

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).

Conclusion: There are no other accessory apartments in the neighborhood. Thus, the Hearing Examiner concludes that the proposed special exception will not create an excessive concentration of similar uses.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise must not be

located in the yard area between the front of the house and the street right-of-way line.

Conclusion: There are at least four off-street parking spaces in Petitioner's driveway (six according to the Technical Staff), and one more space in Petitioner's garage. Moreover, there is on-street parking available on both sides of Petitioner's street. The Hearing Examiner concludes that ample parking is available to accommodate the proposed use, according to all the evidence.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this Report, the Housing Code Inspector's report (Exhibit 13) notes certain issues, and has recommended that occupation of the accessory apartment be limited to no more than two unrelated persons or a family of four. As noted above, Petitioner has agreed to meet all conditions.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2607 for a special exception for an accessory apartment located at 2608 Woodedge Road, Silver Spring, Maryland, be GRANTED, with the following conditions:

6. The Petitioner is bound by Petitioner's testimony, representations and exhibits of record;

7. The Petitioner will take the following steps to rectify issues set forth in the Memorandum of Cynthia Lundy, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 13):

- a. An electrical work permit must be obtained and finalized for the kitchen stove in the accessory apartment.
- b. Based on the square footage, no more than two unrelated persons, or a family of four may reside in the unit.
- c. A window that meets housing code standards for emergency egress must be installed in the bedroom located on the right side of unit. (The window shall be at least five (5) square ft. in net clear opening with a minimum net clear height of 22 in. and a net clear opening width of 20 in. with the bottom of the opening not more than 44 in. above the floor).
- d. A vent or grill must be installed in the furnace/laundry room door to ensure sufficient make-up air for proper combustion.
- e. The dryer must vent to the outside.
- f. The entrance door must have a single-cylinder dead-bolt lock installed. The lock must be key operated from the outside; thumb-turn from the inside.

8. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located; and

9. Petitioner must not receive compensation for the occupancy of more than one dwelling unit.

10. Petitioner must dedicate one of the parking spaces on his driveway to the accessory apartment tenant.

Dated: August 9, 2004

Respectfully submitted,

Martin L. Grossman
Hearing Examiner